U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAR 0 6 2014 Office: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on August 13, 2013, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability as a music producer. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate "sustained national or international acclaim" and present "extensive documentation" of his or her achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific evidence. 8 C.F.R. §§ 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel claims that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

II. TRANSLATIONS

The record of proceeding reflects that the petitioner submitted numerous non-certified English language translations and foreign language documents without any English language translations. The regulation at 8 C.F.R. § 103.2(b) provides in pertinent part:

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[1] Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

> (3) Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Although the petitioner submitted a single certified translation at the initial filing of the petition, in response to the director's request for evidence, and on appeal, it is unclear which documents, if any, to which the certifications pertain. The submission of a single translation certification at each submission that does not identify the document or documents it purportedly accompanies does not meet the requirements of the regulation at 8 C.F.R. § 103.2(b)(3). The petitioner did not comply with the regulation at 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

III. ANALYSIS

A. Evidentiary Criteria[2]

> *Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.*

The director determined that the petitioner did not establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor." Moreover, it is the petitioner's burden to establish that the evidence meets every element of this criterion. Not only must the petitioner demonstrate his receipt of prizes and awards, he must also demonstrate that those prizes and awards are nationally or internationally recognized for excellence in the field of endeavor, which, by definition, goes beyond the awarding entity.

In response to the director's request for evidence, counsel claimed that the petitioner's song, [redacted]. A review of the record of proceeding reflects that the petitioner submitted a letter from [redacted] stating that he worked with the petitioner in writing, arranging, and composing the song, "[redacted]," which was performed by [redacted]. The petitioner also submitted screenshots from [redacted] reflecting that "[r]egional Mexican singer/songwriter [redacted] is nominated for Best Regional Mexican Song for [redacted]" (emphasis in original).

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires the petitioner's receipt of prizes or awards. The petitioner has not demonstrated that he was nominated for a Latin Grammy Award. According to the screenshot mentioned above, [redacted] was nominated for the Latin Grammy Award rather than the petitioner. Moreover, the petitioner has not established that a nomination equates to a prize or an award consistent with the plain language of the regulation at 8

[2] On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

C.F.R. § 204.5(h)(3)(i). The petitioner has not submitted documentary evidence reflecting his receipt of a Latin Grammy Award.

In addition, counsel claimed that the petitioner has "written the musical scores for various television productions that have been nominated for multiple national entertainment awards." The petitioner submitted a letter from [redacted] who stated that the petitioner "developed the score of our production entitled [redacted] which went on to receive multiple nominations at the India Catalina Awards in Cartagena, Colombia." The petitioner also submitted an uncertified translation of a letter from [redacted], who stated that the petitioner worked on the musical score for "[redacted] that obtained six nominations at the [redacted]. Further, the petitioner submitted an uncertified translation of a letter from [redacted] who stated that "["Despimplote"] was internationally awarded and was released in the city of [redacted]' but did not identify any specific award. Finally, counsel claimed that the petitioner "won [redacted] Argentina." The petitioner submitted an uncertified translation of an article from [redacted] indicating that "[t]he award for the best music was presented to [redacted] payasos')."

The regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. While the petitioner submitted letters and an uncertified translation of an article, the petitioner did not submit any documentary evidence demonstrating that primary evidence and secondary evidence does not exist or cannot be obtained. Regardless, the letters that have been provided are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (9th Ed., West 2009). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746.

In addition to this deficiency, the letters do not reflect that the petitioner was nominated for his work; instead the letters indicate that specific television shows were nominated. Regardless, as indicated above, the petitioner has not established that nominations equate to prizes or awards. As it relates to the claim that the petitioner received the best music award at the [redacted], the petitioner failed to submit documentary evidence demonstrating that the award is nationally or internationally recognized for excellence in the field.

The lack of primary evidence and specific information regarding the claimed awards and their national or international recognition is insufficient to establish that the petitioner has received nationally or internationally recognized prizes or awards for excellence in the field pursuant to the

regulation at 8 C.F.R. § 204.5(h)(3)(i). Accordingly, the petitioner did not establish that he meets this criterion.

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.*

The director determined that the petitioner did not establish eligibility for this criterion. In counsel's brief submitted on appeal, counsel did not contest the findings of the director for this criterion or offer additional arguments. Therefore, the petitioner abandoned this issue. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims considered to be abandoned when he failed to raise them on appeal).

Accordingly, the petitioner did not establish that he meets this criterion.

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.*

The director determined that the petitioner established eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence of the display of the alien's work in the field at artistic exhibitions or showcases." As will be discussed, the documentary evidence submitted in support of this criterion is not sufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Therefore, as discussed below, the director's decision will be withdrawn.

The petitioner submitted documentary evidence reflecting that he composed and arranged music for [redacted] Florida. In this case, the petitioner's collaboration constitutes evidence of the display of the petitioner's work consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). However, the petitioner did not submit any documentary evidence reflecting that his work has been displayed at any other exhibitions or showcases. Section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires the petitioner's work to be displayed at more than one exhibition or showcase. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require a single instance of service as a judge or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at *1, *12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *1, *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent

degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials). Therefore, the petitioner's decision for this criterion is withdrawn.

Accordingly, the petitioner did not establish that he meets this criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.*

The director determined that the petitioner did not establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a *leading or critical role* for organizations or establishments that have a distinguished reputation [emphasis added]." In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment. A review of the record of proceeding reflects that the petitioner claimed eligibility for this criterion based on his work with FoxTelecolombia, Destino Musical, and Rafael Rodriguez Bencid.

Regarding FoxTelecolombia, the petitioner submitted the previously mentioned letter from Martha L. Goyeneche Pardo who stated that the petitioner developed the musical scores for some of its productions such as *Sin Retorno*, *La Beca*, *Los Fantasmas de Das*, and *Cruces*. The petitioner also submitted a letter from David Cuasquer Chacon who stated that the petitioner participated on the series, *Sin Retorno*, for FoxTelecolombia. Although the letters indicated that the productions were nominated for the India Catalina Awards, the letters do not provide specific information demonstrating how the petitioner's role in composing musical scores was leading or critical to FoxTelecolombia. Although Ms. Goyeneche Pardo discussed the importance of musical scores in television productions, the issue for this criterion is whether the petitioner's specific work was considered as a leading or critical for FoxTelecolombia. The petitioner has failed to establish how his work was critical to FoxTelecolombia and failed to submit evidence such as an organizational structure to demonstrate that the petitioner's role was a leading role.

Regarding Destino Musical, the petitioner submitted a letter from Enrique Ramirez, CEO of Destino Musical, who stated that the petitioner has produced more than 400 different songs and collaborated on more than 50 different albums for Destino Musical. Moreover, Enrique Ramirez claimed that the petitioner has been "invaluable to productions and have directly impact[ed] their successes in term of sales and popularity." However, the letter does not provide specific examples demonstrating that the petitioner's role was leading or critical to Destino Musical. There is no evidence, for instance, comparing the sales of songs and albums that were produced by the petitioner to other producers or employees at Destino Musical. Although the letter indicated that the petitioner and his work was "critical," the documentary evidence does not reflect that the petitioner has performed in a leading or critical role consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). In fact, Enrique Ramirez's position reflects that he performs in a far more leading or critical role than the petitioner. The petitioner did not submit any organizational charts, for example, to demonstrate that his roles were leading or critical when compared to other employees at the organizations. Vague, solicited letters that simply repeat the regulatory language but do not explain how the

petitioner's roles were leading or critical is not persuasive evidence. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Furthermore, although the petitioner submitted copies of numerous compact disc covers, the petitioner did not submit any other documentation establishing that l has a distinguished reputation as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

Finally, regarding , the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires that the petitioner perform in a leading or critical role "for organizations or establishments." As is not an organization or an establishment, the petitioner's role with him does not meet the plain language of this regulatory criterion.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." The burden is on the petitioner to establish that he meets every element of this criterion. Without documentary evidence demonstrating that the petitioner has performed in a leading or critical role for organizations or establishments that have a distinguished reputation, the petitioner has not established that he meets the plain language of this regulatory criterion.

Accordingly, the petitioner did not establish that he meets this criterion.

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.*

The director determined that the petitioner did not establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires "[e]vidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales."

A review of the record of proceeding reflects that the petitioner submitted the previously mentioned letter from l and several uncertified translations of letters that listed the petitioner's work but did not provide any evidence of box office receipts or sales. As cited above, this criterion requires the petitioner to demonstrate his eligibility through either "box office receipts or record, cassette, compact disk, or video sales." Although the petitioner provided evidence showing that he has produced songs and albums that are available for sale, he failed to provide evidence demonstrating the level of sales for any of his work.

On appeal, in referring to letter, counsel claimed that "[w]hile this is not 'box office receipts or record, cassette, compact disk or video sales,' this is comparable evidence." It is the petitioner's burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x). In this case, counsel has failed to establish that the regulatory criteria are not applicable to the petitioner. Further, the proffered letter lacks documentary evidence to support

the claim that the petitioner has "directly impacted" the success of [redacted] "in terms of sales and popularity." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Soffici, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). In addition, the letter contains no specific information comparable to this criterion's requirement, such as the amount of claimed sales or percentage of money that can be attributed to the petitioner.

The regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. The regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the [petitioner's] occupation, the petitioner may submit comparable evidence to establish the [petitioner's] eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria.

An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner's occupation. Throughout this proceeding counsel specifically addressed five of the ten criteria at the regulation at 8 C.F.R. § 204.5(h)(3). Further, although the petitioner did not claim these additional criteria, a music producer could submit documentary evidence regarding the published material criterion, the judging criterion, the original contributions criterion, and the high salary criterion. Counsel provided no documentation as to why these provisions of the regulation would not be appropriate to the profession of a music producer. Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. Again, counsel does not explain why the petitioner could not submit documentary evidence of his commercial successes.

Without documentary evidence reflecting the commercial successes of the petitioner, the petitioner did not establish that he meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x).

Accordingly, the petitioner did not establish that he meets this criterion.

B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

IV. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian,* 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.[3] Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende,* 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

[3] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).